

# DONOR ADVISED FUNDS IN HISTORICAL PERSPECTIVE

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**Abstract:** This article argues that the emergence of a specific financial structure called the donor advised fund (DAF) developed in tandem with postwar efforts to extend the private sector's reach into public welfare through new forms of charitable giving and voluntarism. In charting the gestation, birth, and expansion of DAFs from the late nineteenth century to our present day, it contends that the longstanding tension in American life between state-based regulation and individual freedoms has stood at the heart of debates about charitable tax law. Far from simply reflecting reigning historical forces, DAFs came to shape ideologies about public and private good in American life. A sea change in charitable giving occurred after the passage of the 1969 Tax Reform Act. In response, tax attorneys and charitable organizations sought to extend the designation of "public charity" to protect individuals' charitable assets from being treated as "private foundations," which were subject to new tax burdens and reporting obligations. By looking in particular at American-Jewish philanthropic activism during this period, the article concludes that DAFs emerged as one, among a handful, of new financial vehicles that empowered private wealth and decision-making with the privileges of putatively public charitable entities.

Tax policy shapes people's lives, but historians have not always noticed its human implications. In the 1970s and 80s, the field of history turned its attention to studying the experiences of average people, and policy history, including tax policy, flagged. After all, policymaking that happened through Congressional vote and relied upon legalistic discourse hardly seemed the domain of the common folk. Yet over the past few years, coincident with the financial recession of 2008, a growing number of historians have recognized the many ways that financial policy and the formation of American capitalism affected American lives<sup>1</sup> Whether a newcomer to

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<sup>1</sup> The history of capitalism as a field has rapidly expanded since 2008. See Sven Beckert, *Empire of Cotton: A Global History* (2014); H.W. Brands, *American Colossus: The Triumph of Capitalism, 1865-1900* (2011); Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (2012); Gerald Davis, *Managed by the Markets: How Finance Reshaped America* (New York: Oxford University Press, 2009); David Farber, *Everybody Ought to Be Rich: The Life and Times of John J. Raskob, Capitalist* (New York: Oxford University Press, 2013);

the United States, a member of a racial, ethnic, religious, or sexual minority group, a woman, a child, or an elite politician, Americans all experienced the structures that limned capitalist expansion. Close examinations of transformations in tax policy, thus, have slowly started to weave their way into broader historical inquiry.

This article argues that the emergence of a specific financial structure called the donor advised fund (DAF) developed in tandem with postwar efforts to extend the private sector's reach into public welfare through new forms of charitable giving and voluntarism. In charting the gestation, birth, and expansion of DAFs from the late nineteenth century to our present day, I explain that the longstanding tension in American life between state-based regulation and individual freedoms has stood at the heart of debates about charitable tax law. Since the advent of the federal income tax in the early twentieth century, Congress has injected protections of individual freedom into tax code, creating a basic irony in tax policy that empowers the state, in part, by its ability to provide individuals and entities with exceptions from its pecuniary demands. My aim is not to explicate the legal principles of DAFs, something others in this volume will do to better ends. Rather, in setting DAFs in their historical context, we learn that far from simply reflecting reigning historical forces, DAFs came to shape ideologies about public and private good in American life.

First, a word about sources is in order. I contend throughout that tax code should be read with the same critical eye as any other primary historical document. Its expression in Congressional acts and Internal Revenue Service publications is only one instantiation of tax policy. Its application by lawyers, accountants, advisors, and individual citizens must not be neglected in favor of formal code. Here things get tricky. Tax returns can provide evidence of application, but they are also often highly-stylized documents, interesting for the conventions more than the realities they reflect. Since my own research focuses on the formation of Jewish philanthropic structures over the course of the twentieth century, I have pulled a number of examples of the application of tax principles and law from Jewish institutions and individuals. This represents more than happenstance because Jewish tax lawyers and Jewish philanthropic institutions were among the pioneers in codifying and employing DAFs. Nonetheless, I caution the reader

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Louis Hyman, *Debtor Nation: The History of America in Red Ink* (Princeton, NJ: Princeton University Press, 2011); Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge, MA: Harvard University Press, 2012); Bethany Moreton, *To Serve God and Wal-Mart: The Making of Christian Free Enterprise* (Cambridge, MA: Harvard University Press, 2009); Julia Ott, *When Wall Street Met Main Street: The Quest for an Investors' Democracy* (Cambridge, MA: Harvard University Press, 2011); and Kim Phillips-Fein, *Invisible Hands: The Businessmen's Crusade Against the New Deal* (New York: Norton, 2010).

against assuming direct proportionality between my examples and Jews' involvement in DAFs.

### THE RELIGIOUS ROOTS OF CHARITABLE EXEMPTIONS

Well before the advent of the American income tax, states and governing powers used exemption from taxation as a tool for conferring special status to individuals or institutions, most frequently those associated with religion. In the United States, common practice has long exempted religious property from taxation. The reasons for doing so include precedent in English common law, churches' own tithing systems, and the idiosyncrasies of a disestablishment clause that the courts have interpreted as mandating equal treatment of all religions without precluding governmental encouragement of religion. Throughout the nineteenth century, as religious denominations proliferated, states' property tax exemptions helped new religious institutions fill their coffers with funds undiminished by taxes and enabled them to thrive and expand in the American landscape. What one historian of American religion has characterized as the nineteenth-century democratization of American Christianity must, in part, be recognized as a function of governmental tax expenditures (the flipside of a tax exemption) that favored the growth of multiple religious institutions.<sup>2</sup>

Yet property tax exemptions for religious institutions in the nineteenth century also provided states with a conduit for managing religious life. Indeed, as legal historian Sarah Barringer Gordon argues, the disestablishment of religion in the United States intersected with new modes for states to regulate religious institutions. The property tax exemption was one of the most significant ways for state legislatures to maintain a measure of control over disestablished churches. For example, while states exempted religious institutions from paying taxes on their property, many also put into place strict limitations on how much property those institutions could own. Gordon explains, "Religious societies became the quintessential private associations, simultaneously supported and disciplined by states."<sup>3</sup>

Complementing policies that exempted religious groups from paying property tax, architects of American political structure expressed a commitment to allowing collective "associations," from fraternal lodges to be-

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<sup>2</sup> Nathan Hatch, *The Democratization of American Christianity* (New Haven, CT: Yale University Press, 1989); and Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge, MA: Harvard University Press, 1992). On tax expenditures, in contrast to direct governmental expenditures, see Stanley Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures," *Harvard Law Review*, 83, no. 4 (Feb 1970): 705-738.

<sup>3</sup> See Sarah Barringer Gordon, "The First Disestablishment: Limits on Church Power and Property Before the Civil War," *University of Pennsylvania Law Review* 162, 1 (Dec. 2013): 317.

nevolent societies, to thrive in the new country. In American political thought, the concept of associational life evolved as a state-supported sphere that stood midway between the individual and the government. Not only would the government contract itself to make room for group life, it also would offer specific protections—including tax subsidies—to these groups. In turn, associations allowed governing powers jurisdiction over their structure, organization, and mission. In other words, in order to benefit from the favors of the state, private associations had to put themselves in the public domain by meeting certain requirements of what eventually became termed the “public good.”<sup>4</sup>

Religious institutions served as test cases for generating policy to facilitate what we might think of as association-based liberalism. Historians of American religion explain that religious competition and pluralism thrived in the United States because of the young country’s commitment, in theory though certainly not always in practice, to allowing associations to have equal legal standing, protections, and privileges, so long as each group adhered to certain legal standards. States endowed private assets, most importantly property such as church buildings or the homes that clergy occupied, with the interests of the public good by using those assets as levers for supporting and regulating group life. Thus, the policy makers’ case for private property rights, a fundamental component of capitalism and philanthropy, hinged not only upon individual interest but was also buttressed by the notion of public interest.<sup>5</sup>

Even as state legislatures and courts pledged themselves to the disestablishment of religion and the freedom of private associations, they also ensured their control over defining the structure of American associational life. Prominent in nineteenth-century case law relating to religious and secular associations were disputations about property and wealth. Out of these decisions emerged a set of principles that guided the development of American philanthropy as the overarching mechanism for funding religious and secular associational life. The same tension between private freedom

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<sup>4</sup> See John Brooke, “Ancient Lodges and Self-Created Societies: Voluntary Association and the Public Sphere in the Early Republic,” in Ronald Hoffman and Peter J. Albert eds., *Launching the “Extended Republic”: The Federalist Era*, (Charlottesville: University Press of Virginia, 1996): 273-359, and “Consent, Civil Society, and the Public Sphere in the Age of Revolution and the Early American Republic,” in Jeffrey L. Pasley et. al. eds., *Beyond the Founders: New Approaches to the Political History of the Early Republic* (Chapel Hill: University of North Carolina Press, 2004): 207-250; and Johann Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* (Cambridge, MA: Harvard University Press, 2008).

<sup>5</sup> See Gordon, “The First Disestablishment”; Steven Green, *The Second Disestablishment: Church and State in Nineteenth-Century America* (New York: Oxford University Press, 2010); Hatch, *The Democratization of American Christianity*; and Robert Wuthnow and D. Michael Lindsay, “The Role of Foundations in American Religion,” *American Foundations: Roles and Contributions*, ed. Helmut K. Anheier and David Hammack (Brookings Institution Press, 2010).

and state regulation that coursed through disestablishment debates in the nineteenth century limned the formation of American philanthropy. Tax policy at the state and, eventually, federal levels emerged as a pivot point in these debates because it made visible government regulation in a sphere putatively defined by its separation from governing powers.<sup>6</sup>

#### TAX LAW AND THE EMERGENCE OF MODERN PHILANTHROPIC ORGANIZATIONS

By the final decades of the nineteenth century, critics from many corners raised concerns about the generally enfeebled state of American tax and monetary policy. They worried that a tax system fueled almost exclusively by import duties and excise taxes would fail to keep up with the demands of a growing nation confronting new pressures from industrialization, immigration, and urbanization. Economic crises, particularly the severe depression that started in the spring of 1893, highlighted these misgivings and forced American lawmakers to rethink revenue-raising strategies, risk management, and the allocation of relief funds.

Populists argued that much of American tax strategy operated regressively, protecting those with the most wealth. According to critics, import duties and excise taxes, which raised revenue for the federal government, trickled down to consumers through the commodities they purchased. Everyone from the richest to the poorest paid the same amount for a particular commodity, and, thus, poor people paid a higher percentage of their assets on commodity-based taxes. Even state property taxes appeared to safeguard the wealth of the wealthy; because only real property was taxed, other forms of property, especially salaries and other intangible forms of property (such as stock and partnership interest) held primarily by wealthy individuals, were left as untaxed assets.<sup>7</sup>

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<sup>6</sup> On the history of the philanthropic and nonprofit sector, see Robert Bremner, *American Philanthropy* (Chicago: University of Chicago Press, 1988); Peter Dobkin Hall, *Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organization* (Baltimore: Johns Hopkins University Press, 1992); Alice O'Connor, *Social Science for What? Philanthropy and the Social Question in a World Turned Rightside Up* (New York: Russell Sage, 2007); J. Steven Ott (ed.), *The Nature of the Nonprofit Sector* (Boulder, CO: Westview Press, 2001); and Olivier Zunz, *Philanthropy in America: A History* (Princeton, NJ: Princeton University Press, 2012). For a defense of philanthropy (particularly foundations) as agents of American pluralism, see David Hammack and Helmut Anheier, *A Versatile American Institution: The Changing Ideals and Realities of Philanthropic Foundations* (Washington, DC: Brookings Institution Press, 2013).

<sup>7</sup> Ajay Mehrotra, *Making the Modern American Fiscal State: Law, Politics, and the Rise of Progressive Taxation, 1877–1929* (New York: Cambridge University Press, 2013), 39–44. On governmental regulation of economic risk and capitalism in the nineteenth century, see Levy, *Freaks of Fortune*.

Responding to economic crisis and critics of taxation policy, Congress passed a new tariff law in 1894 that contained the first ever peacetime federal income tax provision. The law also sought to respond to social scientific studies on rising inequality and pragmatic concerns about how to manage a massive population explosion. Progressive economists of the day advocated state-mandated “fiscal citizenship,” with individual obligations to finance social equality. Hardly a radical measure by modern terms, the law mandated a 2 percent flat tax rate, exempted incomes under \$4000, and did not differentiate between earned and inherited income. Furthermore, its potential for success was severely limited by the law’s failure to establish clear methods and agencies for its enforcement.<sup>8</sup>

The very next year, the Supreme Court overturned the 1894 legislation, declaring its attempt to levy a direct tax unconstitutional and setting the legislative course for the creation of an income tax through a constitutional amendment. The short-lived 1894 law, however, contained a clause that would come to define the following century’s worth of charitable tax law: “[N]othing herein contained shall apply . . . to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes . . . .”<sup>9</sup>

Following upon the states’ ratification of the Sixteenth Amendment, which gave Congress the power to tax income, Congress passed the Underwood-Simmons Tariff Act in 1913 to enact the modern income tax. The 1913 law reintroduced the 1894 act’s clause exempting charitable, religious, and educational organizations. One version of the 1913 law went as far as to propose deductions for individual contributions to these organizations. Although rejected in the final act, individual charitable deductions were soon passed as part of the War Revenue Act of 1917.<sup>10</sup>

Notable for its exponential increase of income tax rates in order to support American efforts in World War I, the 1917 revenue act confirmed that the income tax was here to stay and with it progressive measures to tax the highest earners and asset holders at the highest rates. In the midst of their boosted faith in individual taxation and fiscal citizenship, however, lawmakers were careful to protect the structures of private associationalism and denominationalism that had emerged as central to American democracy in the prior century. They did this most clearly through the individual charitable deduction. Now payments made to organizations defined by law as tax exempt, including those with charitable, religious or educational purposes,

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<sup>8</sup> For a discussion of the 1894 tax law, see Mehrotra, *Making the Modern American Fiscal State*, 127-130.

<sup>9</sup> Act of Aug. 27, 1894, ch. 349, § 32, 28 Stat. 509, 556. The Supreme Court determined the act was unconstitutional in *Pollack v. Farmers’ Loan and Trust Company*, 158 U.S. 601 (1895).

<sup>10</sup> See John Buenker, *The Income Tax and the Progressive Era* (New York: Garland, 1985).

could be deducted from an individual's income and, thus, from his tax burden. Significantly, Congress limited the maximum deduction an individual could take to 15 percent of one's income. Over the following decades, as Congress amended its tax policies, that percentage grew until 1969, when it stood at 50 percent.<sup>11</sup>

One might wonder why, just as the United States was scrambling to raise wartime funds, Congress would allow for a mechanism, such as the charitable deduction, to deplete treasury dollars. The answer reflected an enduring commitment to private modes of governance: allowing individuals to make decisions about and for the public good. As Senator Henry Hollis from New Hampshire explained to his colleagues in 1917, "Now, when war comes and we impose these very heavy taxes on incomes, that will be the first place where the wealthy men will be tempted to economize, namely in donations to charity."<sup>12</sup> In the Senator's calculation, individual philanthropic acts were as valuable to American life as collective fiscal obligations; thus, Congress agreed to permit limited charitable, religious, and educational deductions even as they cut into treasury revenue.

New income tax policies initiated an unprecedented intimacy between tax policy and philanthropy. Changing ideals about the proper balance between public and private governance in a healthy democracy shaped tax policy and philanthropic structures. At the same time, pragmatic considerations spurred by the Great Depression, and political angling on the part of business interests also molded the contours of tax and philanthropic policy.

#### PUBLIC AND PRIVATE REFORM AND THE BIRTH OF DAFs

During an era of tax innovation and code making, one could witness parallel experimentation in the philanthropic sector. By the first few decades of the twentieth century, several new vehicles for philanthropic activism emerged, including private foundations, community chests, and community foundations. Although each had precedent in earlier eras, the changes in tax law were instrumental in helping to shape their strategies and purposes.

Cleveland, one of the most important manufacturing centers and the fifth largest city in the United States by the early twentieth century, served as an important hub for philanthropic creativity. The city's wealth combined with its rapid growth and the attendant problems of poverty, inequality, and

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<sup>11</sup> Mehrotra, *Making the Modern American Fiscal State*, 298-307; and Vada Waters Lindsey, "The Charitable Contribution Deduction: A Historical Review and a Look to the Future," *Nebraska Law Review* 81, 3 (2002): 1056-1096.

<sup>12</sup> Quoted in Mark Rambler, "Best Supporting Actor: Refining the 509(a)(3) Type 3 Charitable Organization," *Duke Law Journal* 51, no. 4 (Feb. 2002): 1370-1371. See also Zunz, *Philanthropy in America*, at 88-89.

social disorder prodded leaders to think about how private dollars, alongside public ones, might improve the city for all of its inhabitants and for ongoing business success.<sup>13</sup>

In 1913, Cleveland established the first community chest organization in the nation. An umbrella or federated charitable institution, it was modeled on the Jewish Federation. Jewish leaders in Boston established the first Federation at the end of the nineteenth century, and the model quickly spread to other American cities, including Cleveland, with significant Jewish populations. Federated philanthropies solicited donor dollars, deposited them in a single and undifferentiated account, and then disbursed them according to decisions made by leaders or a committee. With certain exceptions, federated charities, such as Jewish Federations or community chests, allocated exactly the amount of money they took in every year.

In 1914, one year after Cleveland leaders established the city's community chest, a local banker and attorney Frederick H. Goff initiated another charitable structure, the community foundation, with an entirely different plan of operation from that of federated charities. Instead of paying out the amount of charitable dollars that came in each year, Goff's model was premised upon distributing only the investment earnings on charitable dollars, while holding the principal as an endowment fund. Goff's Cleveland Foundation, the first of its kind, became the template for community foundations across the nation.

Central to Goff's community foundation was the creation of an elite board, empowered to make charitable allocations. Goff worried that long after a donor had died, his "dead hand" continued to exercise control over philanthropic funds through bequest arrangements. A "dead hand" of an extraordinarily wealthy private foundation donor, such as Andrew Carnegie and John D. Rockefeller, might stymie philanthropic innovation. Instead, Goff constituted a living board of prominent community leaders to control the Cleveland Foundation and make philanthropic decisions by committee. They took a professional approach to decision-making, often guided by research reports and data, to steer the foundation's course. Board members held convening power to persuade other wealthy families to contribute to

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<sup>13</sup> For historical perspectives on Cleveland, see W. Dennis Keating and David Perry, ed., *Cleveland: A Metropolitan Reader* (Kent, OH: Kent State University Press, 1995), especially Part 5, "Governance: Public and Private"; Carol Poh Miller and Robert Wheeler, *A Concise History of Cleveland* (Bloomington: Indiana University Press, 1997); and Jon Teaford, *Cities of the Heartland: The Rise and Fall of the Industrial Midwest* (Bloomington: Indiana University Press, 1993).



the foundation and to accept the board's decisions about charitable allocation and endowment building.<sup>14</sup>

Throughout the 1920s and 1930s, powerful and wealthy leaders in various cities created community foundations and pledged themselves to an endowment model of charitable aggregation, with a professionalized approach to distribution decisions. Unlike federated charities, community foundations attenuated the act of charitable giving from the distribution of charitable dollars. By designating the earnings on investment as the dollars that would circulate to charity, yet also classifying the totality of assets (principal and earnings) held within the foundation as charitable, leaders of community foundations reconfigured the charitable process.

According to several sources, including its own website, the New York Community Trust, founded in 1924 and modeled on the Cleveland Foundation, opened the first "donor advised fund" in 1931. This claim of origination reveals very little, in part because neither the fund nor the New York Community Trust was subject to any specific regulations that set it apart from other qualifying charitable monies or entities. Furthermore, the terminology of a "donor advised fund" is anachronistic, since no one used that language—or any other unique nomenclature—to distinguish these charitable funds from others until several decades later.<sup>15</sup> Indeed, I have yet to see a source that clarifies anything particularly distinctive about the 1931 fund or its difference from earlier charitable funds held by community foundations.

Still, in their unnamed infancy, community foundation funds supported an endowment model of charitable giving and offered the individual the opportunity to name their funds and, often, suggest a purpose for their earnings to the board. At the same time, by aggregating funds in community foundations, donors also agreed to a collective process of rule by a professionalized board that would extend beyond their lifetime. Community foun-

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<sup>14</sup> On Goff and the Cleveland Foundation, see Zunz *Philanthropy in America*, 54-55; and <http://www.clevelandfoundation100.org/foundation-of-change/invention/goffs-vision/>, accessed July 22, 2015.

<sup>15</sup> See the New York Community Trust's timeline, accessed Aug 13, 2015 at <http://www.nycommunitytrust.org/AboutTheTrust/OurHistoryAwards/tabid/221/Default.aspx>. Brief overviews of the history of DAFs generally echo this assertion. See, for e.g., Victoria Bjorklund, "Choosing Among the Private Foundation, Supporting Organization and Donor-Advised Fund," (2003), accessed July 22, 2015 at [http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub239.pdf?sfvrsn=2\\_27](http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub239.pdf?sfvrsn=2_27); Howard Husock, "Growing Giving: American Philanthropy and the Potential of Donor-Advised Funds," published by the Manhattan Institute, April 2015, 1, accessed on July 22, 2015 at [http://www.manhattan-institute.org/html/cr\\_97.htm#.Va\\_R48bBzGc](http://www.manhattan-institute.org/html/cr_97.htm#.Va_R48bBzGc), 2; and the Razoo Foundation's report on "The Role of Donor Advised Funds ("DAF") in the Democratization of Philanthropy," 2014, accessed on Aug 13, 2015 (<http://razoofoundation.org/wp-content/uploads/2013/10/Role-of-Donor-Advised-Funds-RF-White-Paper-2014.02.13.pdf>).

dation boards, historically comprised of wealthy community leaders who also kept their money in the community foundation, protected individual donors' charitable interests and gave individuals informal, if not formal, methods of accounting for how their money was spent. Further research should explore whether donors to community foundations funds received reports on expenditures and earnings and the extent of control they exercised over them.

#### TAX REFORM AND THE PRIVATIZED PUBLIC

Throughout the interwar years—a period marked by prosperity in the 1920s and, then, the upheaval of the Great Depression—philanthropic activism and professionalization expanded. Charitable organizations raised more dollars than ever before. Economists, gaining mainstream authority, supported this expansion by outlining family budgets complete with charitable lines in the pages of popular magazines. Professional fundraisers made it their life's work to tap into these budget lines. Between 1921 and 1928, Americans increased their philanthropic giving from \$1.75 billion to \$2.5 billion, and the number of Americans who gave likewise rose.<sup>16</sup>

Until recently, historians have understood the Great Depression and the New Deal as ushering in an era of greater state intervention and dismantling private control over social welfare. However, more recent assessments of the economic theories, political policies, and powerful figures at the heart of reconstructing America's political-economy after the Great Depression conclude that private and corporate interests gained significant power to determine and profit from public programs. The charitable deduction was one mechanism through which this expansion could occur since it allowed individuals to reduce their overall tax liability by directing a portion of their tax dollars according to their own determination.

Even in 1938, as the Great Depression ravaged American life, Congress maintained the charitable deduction and, in 1944 during World War II, shifted the tax formula in such a way as to increase the percentage of one's income that could be deducted for charitable purposes.<sup>17</sup> Policymakers re-

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<sup>16</sup> On the dollar figures, see Zunz, *Philanthropy in America*, 74-75. Over the World War I era, philanthropic leaders advanced a newly professionalized and scientific approach to philanthropy. See discussion in Steven Heydemann with Rebecca Kinsey, "The State and International Philanthropy: The Contribution of American Foundations, 1919-1991," in *American Foundations: Roles and Contributions*, ed. Helmut K. Anheier and David Hammack (Brookings Institution Press, 2010), 217-218. On the rise of expert culture in general in American life, see Sarah Igo, *The Averaged American: Surveys, Citizens, and the Making of a Mass Public* (Cambridge: Harvard University Press, 2007).

<sup>17</sup> Although Congress continued to cap individual charitable deductions at 15% of an individual's income, it changed its measurement of income from net taxable income to adjusted gross

mained convinced that philanthropic dollars more than outweighed treasury's tax expenditure and, also, freed up public money to serve other needs.<sup>18</sup> Political scientist Jacob Hacker contends, "Contrary to the traditional emphasis on the critical breakthroughs of the New Deal and Great Society, the late 1930s through the late 1950s were pivotal years in the establishment of America's public-private welfare regime . . . ." <sup>19</sup> By the post-World War II years, as corporations grew ever larger, the stock market embraced a broader investing public, and the philanthropic sector expanded, the line between public and private governance blurred often imperceptibly.<sup>20</sup>

By the 1950s, some American political leaders, especially on the right, found the hazy division between public and private rule discomfiting and, even, nefarious. Indeed, one possible interpretation of the Red Scare is that McCarthyites feared that the public—the government—was losing its control over private life and its ability to guard against covert powers making their way into public policy. Layered upon suspicion of underground power networks were business interests' concerns that their own power would be compromised by workers' collective organizing and the resurgence of union politics after World War II. By aligning with the government's anti-communist agenda, business leaders positioned themselves as acting alongside government in the interest of the public good.<sup>21</sup>

Although charitable foundations hardly took center stage as the targets of anti-communist fervor, they stood among other private entities as suspect for their relatively unregulated freedom to influence public life. As historian Olivier Zunz explains, "America's largest foundations provided funds and collaborated in organizational strategies with the U.S. government" and foundation leaders and foreign policy elites shared close ties.<sup>22</sup> Throughout the 1950s, conservative critics voiced concern that the largest charitable

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income. According to Veda Waters Lindsey, "The effect of this change was to increase the allowable deduction." See Lindsey, "The Charitable Contribution Deduction," 1062.

<sup>18</sup> See Rambler, "Best Supporting Actor" at 1371.

<sup>19</sup> Jacob Hacker, *The Divided Welfare State: The Battler over Public and Private Social Benefits in the United States* (New York: Cambridge University Press, 2002), 279-280.

<sup>20</sup> For a reflection on and rejection of the historiography that has tended to place the New Deal as exceptional in its valorization of public governance, see Jefferson Cowie and Nick Salvatore, "The Long Exception: Rethinking the Place of the New Deal in American History," *International Labor and Working-Class History* 74, no. 1 (Fall 2008): 3-32. Also, see Burgin, *The Great Persuasion*; Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: Princeton University Press, 2003) and Phillips-Fein, *Invisible Hands*.

<sup>21</sup> For a powerful discussion of these alliances, see Phillips-Fein, *Invisible Hands*, chaps. 3 and 5.

<sup>22</sup> Zunz, *Philanthropy in America*, 146. On McCarthyism, see Ellen Schrecker, *Many Are the Crimes: McCarthyism in America* (Princeton: Princeton University Press, 1999).

foundations served as leftist fronts. In 1952 Congress launched hearings to determine whether philanthropic entities were involved in “un-American” or “subversive” activities. In the end, these investigations came up empty, but they served to heighten scrutiny of the philanthropic enterprise.<sup>23</sup>

Criticism of foundations gained traction in the 1960s as it crossed party lines. A set of vocal Democrats in Congress, including Representative Wright Patman (Texas) and Senator Albert Gore (Tennessee), pressed for Congressional investigations and Treasury studies into foundations throughout the 1960s. They gave voice to populist fears that foundations only deepened the concentration of power in the hands of a few wealthy families. As some striking examples of malfeasance and self-dealing on the part of foundations emerged, a broad base in Congress agreed that reform was in order. By the late 1960s, reformatory measures to end foundation abuses gained bipartisan support and made their way into the Tax Reform Act of 1969.<sup>24</sup>

Most significantly, the 1969 act formalized a stark division between public charities and private foundations. According to the new law, any charity classified as public, including all educational and religious organizations, received immunity from most regulatory demands, since Congress determined that these organizations by their very nature acted in the best interest of the public. In contrast, private foundations, as a class, faced several new regulations to bolster their accountability to the public and to limit the tax incentives (or public subsidies) they received. In the eyes of Congress, individual control over private foundations would be counterbalanced by a public regulatory and reporting apparatus placed upon those private foundations. Despite pending proposals at the time, Congress stopped short of limiting the lifespan of private foundations, a proposal that some legislators had hoped would decisively block long-term abuses of power.

Clearly, the reforms intended to create new measures of public accountability for those philanthropic bodies—so-called private ones—that offered donors the most command over their dollars. Yet, even as the legislation mandated reporting requirements, excise taxes, spend-out percentages, and caps on deductions for private foundations, it left open several safe harbors for philanthropic funds that acted in similar ways to private foundations yet channeled their money through public structures, such as community foundations or federated charitable bodies. The true origin of the donor advised fund rests in these safe harbors and their close ties to the

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<sup>23</sup> Zunz, *Philanthropy in America*, 189-200.

<sup>24</sup> Thomas Troyer, “The 1969 Private Foundation Law: Historical Perspective on Its Origins and Underpinnings,” *The Exempt Organization Tax Review* 27, no. 1 (Jan 2000): 52-65.

endowment model of charity that had already emerged in the early twentieth century. The intersection of these two modes—charitable endowments and individual donor control over public charitable dollars—can be closely observed by tracing the emergence of DAFs in Jewish philanthropy.

#### DAFs IN THE AMERICAN JEWISH PHILANTHROPIC COMPLEX

For the student of American philanthropy, it should come as little surprise that Cleveland and Jews together played a significant role in shaping twentieth-century philanthropic innovation. As discussed above, Cleveland's mix of wealth and social need provided fertile ground for philanthropic experimentation, and by the early decades of the twentieth century, Jews distinguished themselves as able philanthropic practitioners. In the late nineteenth century, they created the Jewish Federation system, a philanthropic institution that mirrored the semi-autonomous communal structures that governed much of European Jewish life. Jews established chapters of the Federation in almost every American city in the first decades of the twentieth century, and by World War II almost 300 chapters existed in North America. Although each was different, Federations all raised money through annual campaigns and then relied upon committees (similar to community foundation boards) to allocate those dollars to domestic and foreign Jewish causes. Cleveland's Jewish Federation, one of the earliest in the country, was founded in 1903 and, by the middle decades of the century, it served as a centerpiece of the city's philanthropic vitality.<sup>25</sup>

By the middle of the twentieth century, a Jewish lawyer named Norman Sugarman emerged as an activist in American tax law reform and Jewish philanthropic expansion by popularizing new charitable models, including the donor-advised fund. Born in 1917 in Cleveland, Sugarman moved in 1940 to Washington, D.C., where he served as an attorney for the Bureau of Internal Revenue (renamed the Internal Revenue Service in 1953). In his role at the IRS, he worked with legislators on tax reform, developing several new tax forms and issuing policy rulings, many related to charitable ex-

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<sup>25</sup> The two most important and analytical discussions of the Jewish Federation system can be found in Daniel Elazar, *Community and Polity: The Organizational Dynamics of American Jewry* (Philadelphia: Jewish Publication Society, 1976); and Jonathan Woocher, *Sacred Survival: The Civil Religion of American Jews* (Bloomington: Indiana University Press, 1986). For institutional histories of the Federation movement, see Harry Lurie, *A Heritage Affirmed: The Jewish Federation Movement in America* (Philadelphia: Jewish Publication Society, 1961); and Philip Bernstein, *To Dwell in Unity: The Jewish Federation Movement in America Since 1960* (Philadelphia: Jewish Publication Society, 1983). For a more recent sociological analysis, see Shaul Kelner, "Religious Ambivalence in Jewish American Philanthropy," in Thomas J. Davies, ed., *Religion in Philanthropic Organizations* (Bloomington: Indiana University Press, 2013). For the classic history of Jewish life in Cleveland, see Lloyd Gartner, *History of the Jews of Cleveland* (Cleveland, OH: Western Reserve Historical Society, 1978).

emptions. His intimate familiarity with tax code—he provided language that made its way into legislation—proved invaluable to him when he moved back to Cleveland in 1954 and joined a large private firm there, where he grew his practice around charitable giving by donors and organizations qualifying for charitable tax exemptions.<sup>26</sup>

In testimony before the House Committee on Ways and Means in February 1969, Sugarman set out his vision for the proper balance between governmental regulation and individual autonomy in the charitable sector. He vehemently opposed proposed measures that would impose taxes on unrelated trade or business income. He explained, “To tax a charitable organization does not carry out Congress’ purpose in allowing the charitable organization to exist in the first place. Taxing the organization would remove funds that would otherwise be available for the charitable purpose.”<sup>27</sup> He concluded his testimony, “I believe that a sound principle is that legislative solutions which restrict the private sector of our economy should be imposed only with respect to problems requiring resolution and should go no further than the specific bounds of those problems.”<sup>28</sup> In other words, stop egregious abuses of tax exemptions, but avoid regulatory overreaching. He realized, however, that whatever the specifics of the new law, charitable giving was set on course to change immensely.<sup>29</sup>

In workshops for community foundations and, especially, the Jewish Community Federation of Cleveland, Sugarman made it his business to educate leaders to anticipate tax changes poised to become law by the Tax Reform Act of 1969. The core component of his advice revolved around ways that his clients could benefit from the law’s division between public charities and private foundations. Sugarman well understood the advantages that public charities and their donors would receive. He also knew that with the passage of the law, charities that did not fall squarely on one side of the division would have the opportunity to craft a narrative to prove their status in the eyes of the IRS. Sugarman urged his clients to join one’s fate to the public side rather than hold onto a private status and lose tax benefits and other freedoms. As such, he advised his clients to create a historical record proving their public mission and showing their effort to attract a broad base of donors. He also worked to educate his clients’ donors about the tax benefits

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<sup>26</sup> Brief biographical sketch of Norman Sugarman, provided by Paul Feinberg, copy in author’s possession.

<sup>27</sup> See “Testimony Given before the House Committee on Ways and Means in the Course of Tax Reform Hearings before that Committee,” Feb 19, 1969, reported in *Congressional Digest, Articles and Addresses*, vol. 5, 1966-1970, Box 2, Norman Sugarman Papers, P-633, American Jewish Historical Society at the Center for Jewish History, New York, NY, hereafter NS.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

of giving appreciated stock and securities as donations. To this day, while a contribution of cash offsets income by the amount of the contribution, a contribution of appreciated assets provides a double benefit because it provides both an income tax deduction and avoids capital gains taxes on the appreciation.

Immediately after the passage of the Tax Reform Act of 1969, Sugarman toured the country, speaking to community foundations and Jewish organizations about how to comply with and gain from the Act. To a Jewish group in Kansas, he enthused that “with some imagination and use of initiative” the new tax law held exciting opportunity. Sugarman consistently made two recommendations to his audiences: that they petition the IRS immediately for designation as a public charity; and that they turn attention to building endowment funds.<sup>30</sup>

Sugarman’s suggestions, of course, reflected his intimate understanding of the new tax code and several elements of it that he had helped craft. The Code, indeed, gave clear preferential treatment to public charities over private foundations and, simply put, positioned public charities to aggregate resources more effectively. For example, when it came to distributing dollars held by charitable organizations, private foundations were now subject to a payout rule (as modest as it was at five percent), while public charities were not; and private foundations owed an excise tax on certain kinds of investment income, whereas public charities did not. Thus, a public charity served as a more efficient vehicle for holding endowment funds and could offer individuals immediate tax deductions, whether or not those funds were spent.<sup>31</sup>

The status of a community foundation was not entirely clear in the new tax landscape, and Sugarman realized that the sooner community foundations and Jewish Federations could set precedent for their designation as public charities, the more likely the law would support such designations. As soon as the law passed, Sugarman, in his capacity as legal counsel for the Cleveland Jewish Federation, requested and received a private-letter ruling from the IRS to recognize the Federation as a “publicly supported organization.”<sup>32</sup>

In addition to enabling the Federation to receive the favorable tax treatment afforded to public charities, the IRS ruling also opened the door to

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<sup>30</sup> Norman Sugarman, “New Opportunities in Endowment Funds,” Address before the 39<sup>th</sup> Annual General Assembly of the Council of Jewish Federation and Welfare Funds, Kansas City, Missouri, Nov, 1970, Articles and Addresses, vol. 5, 1966-1970, Box 2, NS.

<sup>31</sup> Troyer, “The 1969 Private Foundation Law.”

<sup>32</sup> Norman Sugarman (chairman of the Tax Handbook Committee), “Handbook for Charitable Giving,” published by the Jewish Community Federation of Cleveland, 1972, Articles and Addresses, vol. 6, 1971-1974, Box 3, NS.

a new revenue stream for community foundations and Jewish Federations: dissolved private foundations. In his conversations with Jewish Federation executives, Sugarman strongly urged them to establish close relationships with families who held private foundations and would bear the burden of the new tax law's regulations. The skilled Federation executive, armed with knowledge of tax changes, could convince these families to transfer the assets from their private foundations into public charitable housings, such as a Jewish Federation. Sugarman explained that private family foundation assets, when properly placed in public charities, could gain all the benefits of public charities and still provide the donor with a measure of control.<sup>33</sup>

For the case he wanted to mount to families with private foundations, Sugarman had to suggest that individual donors could retain power over funds housed in public charities. This was different from the longstanding practice of community foundations and Federations to designate a subset of donors, often the most elite and powerful ones, as a board or committee charged with determining philanthropic priorities; rather, Sugarman envisioned individual donors' maintaining clear, if not legally mandated, authority over the designation of their charitable dollars, even as these dollars operated in the space of a public charity. The IRS nodded toward an informal system of donor control, writing in a private-letter ruling to Sugarman (acting as the attorney for the Cleveland Jewish Federation): "You will establish a fund which shall be known as the [a family's name] Philanthropic Fund . . . . [The family] may submit to you names of organizations to which they recommend distributions be made. Such recommendations shall be solely advisory, and you may accept or reject them, applying reasonable standards and guidelines."<sup>34</sup>

Sugarman had succeeded in generating an IRS statement in favor of donor control over public charitable dollars. Of course, the ruling hedged on the extent of individual power by using words such as "recommend" and "advisory," but it clearly allowed for public charities to protect individual decision-making capacity and to use this protection to entice private foundations and other donors to store their charitable dollars in public housings. In Sugarman's view, public charities stood to benefit from this arrangement, as they would gain power to convene fund holders, to influence their phil-

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<sup>33</sup> He made these suggestions to Jewish leaders in several cities. See "New Opportunities in Endowment Funds," Nov. 1970; "Outline of Remarks before the Jewish Federation of St. Louis," Oct 13, 1975, Articles and Addresses, vol. 7, 1975-77, Box 3, NS; and "Use of Charitable Gifts in Tax Planning," Address before a Tax Seminar Sponsored by Jewish Federation of Rhode Island, Providence, June 19, 1978, Articles and Addresses, vol. 8, 1978-1979, Box 3, NS.

<sup>34</sup> Letter from J.A. Tedesco, Chief, Rulings Section, Exempt Organizations Branch, IRS, to Jewish Community Federation of Cleveland, Oct 28, 1970, reprinted in Sugarman, "Handbook for Charitable Giving," 50-51.



anthropic decisions, and to operate and invest their funds. Foremost in Sugarman's estimation was the fact that these funds could help build endowments for community foundations and Jewish Federations. Much like Goff, who established the Cleveland Foundation, Sugarman believed that endowed charities were the most effective tools for empowering philanthropy.

In his speeches, Sugarman searched for the right terminology to describe these new quasi-private funds that would be housed in public charities. He often spoke of them as "philanthropic funds" and occasionally called them "advised" or "designated" funds. Only in the mid-1980s did Jewish Federation and community foundation professionals begin calling them donor-advised funds.

In 1972, the Jewish Federation of Cleveland published a "Handbook for Charitable Giving" under Sugarman's leadership and reprinted several of the private-letter rulings it had received.<sup>35</sup> The handbook outlined the same set of advice Sugarman had already given handfuls of Federation and community foundation leaders, tax lawyers, and nonprofit associations.<sup>36</sup> To a group of Jewish leaders in St. Louis, he reiterated, "[t]he basic point involved in philanthropic funds is that it enables individuals, who would like to create a fund as a memorial, a monument, or for current charitable purposes, to have the advantage of current income tax deductions in building such a fund, as well as the benefit of creating a permanent fund as part of their long-range program."<sup>37</sup> In the same lecture, he also extolled the virtues of so-called supporting organizations and other strategies for protecting individual donors' autonomy while also growing community foundations' endowment power. Sugarman was well aware that neither the Tax Reform Act of 1969 nor IRS rulings gave individuals legal control of funds they designated to be held in public charities. But he believed mightily that endowment dollars were essential to ensuring the strength of philanthropy, especially against other public sector and governmental programs, and he trained the leaders of Jewish Federations and community foundations to expect that in order to build their endowments, they would have to cede some element of collective governance to greater individual control, if not by law than by informal practice.

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<sup>35</sup> Sugarman, "Handbook for Charitable Giving."

<sup>36</sup> See, for example, "Community Foundations Under the Tax Reform Act of 1969," A comprehensive analysis prepared for distribution by the Council on Foundations, June 19, 1970, Articles and Addresses, vol. 5, 1966-1970, Box 2, NS; "The Effect of the Tax Reform Act of 1969 on Charitable Trusts: Problems and Possible Alternatives," a memorandum prepared for distribution by the New York Community Trust, March 29, 1971, Articles and Addresses, vol. 6, 1971-1974, Box 3, NS.

<sup>37</sup> "Outline of Remarks before the Jewish Federation of St. Louis," Oct 13, 1975.

To his dismay, Sugarman encountered some Jewish leaders who were neither keen on his regard for the individual donor nor interested in entering the business of endowment building and fund management. Many Federation executives at the time were trained social workers and felt concerned that the core of their work—providing services to Jewish populations in need—would be compromised if they raised dollars outside of their annual fundraising campaign, sequestered portions of their charitable dollars to serve as endowments and not charitable allocations, and gave individual donors the opportunity to recommend how charitable money was spent.<sup>38</sup>

In some cases, when Federation executives balked, wealthy Jewish leaders formed separate public charitable entities to build endowments and wrest themselves free of the traditional Federation model of distributing as many dollars as were raised in the annual campaign. For example, in 1972 a group of Jewish leaders with ties to New York City's Federation formed the Jewish Communal Fund to house, invest, and grant money held in its endowment, including individually named philanthropic funds.<sup>39</sup> In general, religious institutions, including Catholic Charities, were some of the earliest adopters of these strategies to grow their philanthropic assets.<sup>40</sup>

Briefly—and worthy of deeper exploration elsewhere—Sugarman's suggestions threatened to undermine the structure of collective giving so central to the rhetoric and, often, the purpose of Jewish philanthropy (as well as other federated philanthropy). His endowment model elevated individual donors and their philanthropic priorities, and by design enabled the donors who gave the most money to set philanthropic agenda. Eventually, upon the death of a donor or some stipulated moment, the fund might merge into the collective fund and shed its traces of a specific donor's intent. Sugarman, however, paid little attention to the re-collectivization of philanthropic funds, instead believing that simply aggregating these funds in Jewish structures would redound benefit to Jewish philanthropic goals.

Despite a core tension between Sugarman's model and the Jewish Federation's commitment to collective giving, Sugarman's counsel provided a roadmap for its financial strategies. Indeed, by 1986, the Jewish Federation

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<sup>38</sup> The *Journal of Jewish Communal Service*, founded in 1902 as a resource for Jewish communal professionals, reveals that only starting in the 1970s did non-social workers with some frequency start to fill executive positions in Jewish communal organizations.

<sup>39</sup> On the Jewish Communal Fund, see <https://www.jcfny.org/about-us/history/>, accessed July 22, 2015. I also have learned about the inception of the fund from my conversations with Sue Dickman, Executive Vice President and CEO of the Jewish Communal Fund, Oct. 22, 2014; and Donald Kent, former Director of Planned Giving and Endowment for the Council of Jewish Federations, Jan. 13, 2015.

<sup>40</sup> On religious groups' use of DAFs, see D. Michael Lindsay and Robert Wuthnow, "Financing Faith: Religion and Strategic Philanthropy," *Journal for the Scientific Study of Religion* 49, no. 1 (March 2010): 93-94.

system held \$1 billion in endowment funds, and by 2013, its endowment was valued at \$16 billion, with a full third of those dollars in DAFs.<sup>41</sup> No longer did individual donors who gave money to a Jewish Federation, for example, have to consider their dollars as tied to the Federation's mission. Rather, they could park their money there and then spend it when they wanted and as they wished. Indeed, a donor's fund did not even have to help augment the endowment of a Federation, since he or she could treat the fund as a checkbook of sorts and not a place to aggregate charitable dollars. Charitable endowment practices grew with the rise of donor advised funds, but these same funds also broadened the ability of the donor to act and give in ways that did not necessarily strengthen the mission of a public charity.

As the practice of donor designation of public charitable funds expanded, the power of the individual grew. Even absent a new legal ruling that clarified the extent of an individual donor's advisory capacity, the rule of common practice within community foundations and Jewish Federations alongside competition with commercial investment firms, (that starting in the early 1990s opened their own DAFs) all but formalized donor autonomy.

#### THE COMMERCIALIZATION OF DAFs

By the early 1990s, commercial investment managers moved into the roles that tax lawyers and philanthropic advisors such as Sugarman had held just a few decades earlier. In the hands of business-school graduates and investment specialists, the possibilities for DAFs—as philanthropic vehicles, investment holdings, and a management service offered by commercial financial entities—expanded. The number of DAFs grew steadily, reaching well above 200,000 by 2013 and holding an estimated \$53.7 billion.<sup>42</sup> Beyond anything else, these numbers indicated the entrance of commercial investment houses into the business of administering DAFs.

In 1991, Fidelity Investments established the Fidelity Charitable Gift Fund with the blessing of a public charity designation from the IRS. The informality of the relationship between donors and their control over their funds held in public charities had changed very little from Sugarman's days in the 1970s. But Fidelity had the size, personnel, and dollars to make DAFs into an industry.

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<sup>41</sup> For the most recent valuation of Federation endowment dollars, see 2013 Annual Survey of Planned Giving and Endowment Programs, Jewish Federations of North America, copy in author's possession. For comparative data from the 1980s and 1990s, see Jack Wertheimer, "Current Trends in American Jewish Philanthropy," *American Jewish Year Book*, 1997.

<sup>42</sup> See the National Philanthropic Trust's 2014 report on Donor-Advised-Funds, accessed July 22, 2015 (<http://www.nptrust.org/daf-report/>).

Over the coming decade, as Fidelity programs succeeded in drawing clients to invest in its charitable portfolios, other commercial investment houses followed suit and established their own charitable funds. By 2000, investors could put money in DAFs held at Vanguard, Schwab, Oppenheimer, and J.P. Morgan Chase. Investors who had never heard of DAFs learned about them through their financial advisors. Some, who had kept their charitable accounts at other public charities, including community foundations and Jewish Federations, moved their funds to the commercials in hopes of streamlining their investments or receiving more professional management of their charitable dollars, generally, though not always, at reduced management fees. At the same time, the commercials steadily worked to make their DAFs more attractive by lowering minimum contributions and grant amounts and encouraging investors to move a portion of their appreciated marketable securities into DAFs, a move with clear tax benefits.<sup>43</sup>

With the entrance of commercial investment services into the DAF industry, the community foundations and public charities that had once been the unrivaled holders of DAFs worried that they would lose their corner of the charitable market. Significantly, a lawyer representing Jewish Federation's national office and a former IRS Commissioner himself, agitated for the IRS to scrutinize Fidelity's practices more closely—though, perhaps equally significant, one of the chief architects of Fidelity's DAF program was a Jewish woman named Jamie Jaffee who earned respect for her ingenuity from leaders of Jewish private foundations.<sup>44</sup>

According to Donald Kent, former Director of Planned Giving and Endowment for the national office of the Jewish Federations, who served from 1986 to 2000, Jewish public charities initially felt threatened by the commercials because they could afford to take risks and push legal boundaries. Some Jewish public charities, along with community foundations, worried about losing a critical income stream and element of their grant making work to the commercials. They responded by lowering their investment fees, bringing in new investment talent, and lobbying Congress to clarify DAF practices in order to create a level playing field. At the same time, the

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<sup>43</sup> See Michael Hussey, "Avoiding Misuse of Donor Advised Funds," *Cleveland State Law Review* 58, no. 1 (2010): 63-64, 77. On the tax benefits of donating marketable securities, see also, Bjorklund, "Choosing Among the Private Foundation, Supporting Organization and Donor-Advised Fund," and Jane Gravelle, Statement before the Committee on Finance, United States Senate at 17, April 5, 2005 (<http://www.finance.senate.gov/imo/media/doc/jgtest040505.pdf>).

<sup>44</sup> See Monica Langley, "Fidelity Gift Fund Soars, But the IRS Is Skeptical," *Wall Street Journal*, Feb. 12, 1998 (<http://www.wsj.com/articles/SB887235489239453000>). In one observer's estimation, the IRS tax regulators who approved Fidelity's application to become a public charity in 1991 must have been "asleep at the switch, or understaffed, or outlawyered." See Alan Cantor, "Wall Street's Charitable Gold Rush," Feb 28, 2015 (<http://alancantorconsulting.com/2015/02/wall-streets-charitable-gold-rush/>).

success of the commercials forced these public charities to better explain why their services—often marked by personal relationships and values-based discussions with donors—were superior to those of the commercials. Over the long run Kent believed that the commercials conferred legitimacy to DAFs, helping all DAF-sponsoring charities attract more donors and assets, and educating Jewish donors to seek DAFs out in Jewish organizations.<sup>45</sup>

Nothing did more to sanction DAFs and broaden the industry than the passage of the Pension Protection Act in 2006. Until then, DAFs did not exist in IRS code or regulations. Indeed, one of the reasons it is so difficult to pinpoint when the first DAF came into existence is because the term itself held no legal standing until 2006, even as it was used in practice well before this. Had DAFs remained solely an instrument of community foundations and a handful of other public charities, Congress likely would not have felt moved to define their legal terrain or impose excise taxes to prevent abuses. Yet with the astronomical growth of the DAF field came some reports of abuse and, also, questions about their intermediary status as public charitable funds that nonetheless gave individual donors free rein.

Although it instituted modest regulations over the funds in 2006, Congress did not substantially change DAFs in spirit. Proceeding with caution, Congress requested the Department of Treasury to perform studies about DAF practices. As reports came back, some members of Congress grew skeptical that DAFs were efficacious charitable vehicles and, thus, supported payout requirements and other regulations on them.<sup>46</sup> Still, at the moment of writing, little evidence points to a sea change of policy relating to DAFs. Though impossible to prove, we might surmise that by sharpening the legal status of DAFs, Congress helped them grow; since the passage of the Pension Protection Act, the number of DAFs and assets held within them has more than doubled.<sup>47</sup>

## CONCLUSION

If one wished to understand philanthropy and its role in shaping nineteenth-century American democracy, he or she would begin by turning to excerpts from the Federalist Papers, Alexis de Tocqueville's *Democracy in*

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<sup>45</sup> Conversation with Donald Kent, Jan 13, 2015.

<sup>46</sup> Chief among congressional advocates of tighter regulations on DAFs was former Representative Dave Camp (R-Michigan), who crafted an amendment to mandate a five-year period in which DAFs would have to spend out their funds. See Alan Cantor, "Donor-Advised Funds Let Wall Street Steer Charitable Donations," *Chronicle of Philanthropy*, Oct. 28, 2014 (<https://philanthropy.com/article/Donor-Advised-Funds-Let-Wall/152337>).

<sup>47</sup> See Husock, "Growing Giving: American Philanthropy and the Potential of Donor-Advised Funds."

*America* (1835), and Andrew Carnegie's "Gospel of Wealth" (1889). If one pursues the same task but wishes, instead, to understand how American philanthropy has changed over the course of the twentieth century, he or she should read tax codes, starting with the 1913 income tax and, also, private-letter IRS rulings that paved the way for the creation of DAFs after the 1969 Tax Reform Act. Simply put, these documents communicate core values about American democracy its restraints on individualism and collectivism.

The rise of DAFs transformed the nature of American philanthropy by conferring upon private expenditures and decision-making the privileges of public sanction and subsidy. To be certain, the assets held in DAFs pale in comparison to tax revenue and government spending. Yet as an indication of attitudes toward social reform, the development and expansion of DAFs reveal a steady trend toward empowering private entities to set agenda when it comes to education, public health, social welfare, and more. In their observation of "sector blur," recent critics have noted that the lines between government, the nonprofit world, and the private for-profit world have become less distinct, especially as all of these sectors have looked toward the market as the indicator of their success.<sup>48</sup>

While many DAFs take money in and spend it out quickly, the assets held in DAFs are always invested and those entities that house DAFs generally have an interest in maintaining those assets for the returns—including management fees, investment earnings, and portfolio strength—they might bring. The practices are in keeping with a growingly financialized model of post-industrial, globalized citizenship.<sup>49</sup> Gerald Davis, a scholar of management, sociology, and finance, observes of this new era, following on the heels of the postwar years: "What emerged can be called a *portfolio society*, in which the investment idiom becomes a dominant way of understanding the individual's place in society. Personality and talent become 'human capital,' homes, families, and communities become 'social capital,' and the guiding principles of financial investment spread by analogy far beyond their original application."<sup>50</sup>

Whether attached to endowment building aims or simply placed in commercial accounts, DAFs provide individuals with immediate tax benefits and the ability to aggregate philanthropic dollars for an undetermined moment in the future. Housed in public charitable structures, these funds are imprinted with a responsibility to serve the public good in some fashion.

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<sup>48</sup> For different perspectives on the implications of sector blur, see Henry Mintzberg, "Time for the Plural Society" and Garry Jenkins, "The Wall Street Takeover of Nonprofit Boards," both in *Stanford Social Innovation Review*, 13, no. 3 (Summer 2015).

<sup>49</sup> On "financialization" see, Greta Krippner, *Capitalizing on Crisis: The Political Origins of the Rise of Finance* (Cambridge, MA: Harvard University Press, 2011).

<sup>50</sup> Davis, *Managed by the Markets* at 6, italics in original.

Yet as critics and policymakers weigh their efficacy, they confront the high burden of operating in the name of the public, especially when that public is disenfranchised from deciding how tax expenditures in the form of charitable deductions are spent. Surely, our democracy has a long tradition of protecting individuals and investing in their innovations, sometimes at the expense of a broad public. As we examine our tax policies and their relationship to our values about democracy, social justice, and equality, we would do well to dwell upon the extent to which our philanthropic apparatus accords with the content of those values. A tax system that rewards asset-rich individuals with more charitable spending power, dollar for dollar, may, in the end, be structurally incapable of moving our society closer toward true justice.

